

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ARTHUR BALDER,

Case No.: 1:22-cv-060401-JLR-SN

Plaintiff,

v.

SUSAN SARANDON; DAVID SHARA;
HONEY SHARA; TIGRAN TSITOGHDZIAN,

Defendants.

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**DEFENDANTS' PARTIAL OBJECTIONS TO U.S.M.J. SARAH NETBURN'S REPORT
AND RECOMMENDATION**

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TABLE OF CONTENTS

STATEMENT OF FACTS	1
STANDARD OF REVIEW	4
OBJECTIONS.....	4
I. PLAINTIFF FAILED TO SUFFICIENTLY ALLEGE BREACH OF THE PRODUCER AGREEMENT AGAINST SHARA.....	4
A.Plaintiff Did Not Adequately Plead Breach of Contract as a Result of Alleged Late Payments of Invoices	5
B. The Plaintiff Does Not Adequately State a Claim for Breach for Receiving an Allegedly Unfinished Painting	8
II. PLAINTIFF HAS ALSO FAILED TO SUFFICIENTLY ALLEGE CLAIMS FOR TORTIOUS INTERFERENCE WITH CONTRACT AGAINST TSITOGHDZYN.....	9
A. Plaintiff has Still Failed to Plausibly Allege Breach of an Identified Agreement	9
B. Plaintiff Failed to Sufficiently Allege Knowledge or Intentional Procurement of an Alleged Breach.....	10
III. PLAINTIFF HAS ALSO FAILED TO SUFFICIENTLY ALLEGE CLAIMS FOR TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS AGAINST SARANDON	11
A. Plaintiff Failed to Allege the Existence of Business Relations with Shara with respect to the Nazi Propaganda Project.....	11
B. Plaintiff Fails to Allege that Sarandon’s Alleged Behavior Was With the Sole Purpose of Harming the Plaintiff	12
C. Plaintiff Fails to Allege a Wrongful Means Without Justification or Unlawful Conduct.....	13
IV.PLAINTIFF FAILED TO SUFFICIENTLY ALLEGE HIS FRAUD CLAIM AGAINST SHARA AND TSITOGHDZYN	15
A.Shara and Tsitogdhzyan’s Alleged Statements do not Support a Fraud Claim.....	15
B. Plaintiff Also Failed to Plead a Plausible Inference of Intent	16

C. Plaintiff also Fails to Sufficiently Plead Justifiable Reliance 17

D. Plaintiff’s Fraud Claim is Barred by the Statute of Frauds..... 18

V. PLAINTIFF’S FRAUD CLAIM IS DUPLICATIVE TO THE BREACH OF
CONTRACT CLAIM 19

VI. THE COPYRIGHT INFRINGEMENT CLAIMS ARE NOT SUFFICIENTLY PLED 19

A.Plaintiff Failed to Allege that Tsitoghdzyan or Honey Shara Exceeded the Scope of the Licenses
he Allegedly Gave..... 20

VII. PLAINTIFF’S TAC SHOULD BE DISMISSED WITH PREJUDICE 22

CONCLUSION..... 23

TABLE OF AUTHORITIES

	Page(s)
Cases	
Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc., (S.D.N.Y. 2009) 651 F.Supp.2d 155.....	8
Amusement Indus., Inc. v. Stern, 786 F. Supp. 2d 758 (S.D.N.Y. 2011).....	18
Banner v. Lyon & Healy, Inc., 249 AD 569, affd, 277 N.Y. 570 (1938)	16
Bristol-Myers Squibb, Indus. Div. v. Delta Star, Inc., 620 N.Y.S.2d 196 (4th Dep’t 1994).....	19
Brown Media Corp. v K & L Gates, LLP, 586 BR 508 (EDNY 2018)	12
Burrowes v. Combs, 25 A.D.3d 370 (1st Dep’t 2006)	10
BWP Media USA Inc. v Hollywood Fan Sites, LLC, 69 F Supp 3d 342 (S.D.N.Y. 2014)	22
Chapman v. N.Y. State Div. for Youth, 546 F.3d 230 (2d Cir. 2008).....	20
Corning Inc. v. Shenzhen Xinhao Photoelectric Technology Co., Ltd., 546 F.Supp.3d 204 (W.D.N.Y. 2021)	11
Davis v. Blige, 505 F.3d 90 (2d Cir. 2007).....	20
Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc., 837 F. Supp. 2d 162 (S.D.N.Y. 2011).....	5
Energy Intelligence Group, Inc. v Jefferies, LLC, 101 F.Supp.3d 332 (S.D.N.Y. 2015).....	20
Flatiron Acquisition Vehicle, LLC v. CSE Mortg. LLC, 2019 WL 1244294 (S.D.N.Y. 2019).....	5

Fleissler v. Bayroff, 266 A.D.2d 34 (1st Dep’t 1998)	5
Frontier- Kemper Constructors, Inc. v. Am. Rock Salt Co., LLC, 224 F. Supp. 2d 520 (W.D.N.Y. 2002)	19
Goldman v. Strough Real Estate, Inc., 770 N.Y.S.2d 94 (2d Dep’t 2003).....	16
Graham v. James, 144 F.3d 229 (2d Cir. 1998).....	20
Granite Partners, L.P. v. Bear Stearns & Co. Inc., 17 F.Supp.2d 275 (S.D.N.Y. 1998)	8
Guard–Life Corp. v. S. Parker Hardware Mfg. Corp., 428 N.Y.S.2d 628 (1980)	14
Hamil Am. Inc. v. GFI, 193 F.3d 92 (2d Cir. 1999).....	22
Hidden Brook Air, Inc. v. Thabet Aviation Intern. Inc., (S.D.N.Y. 2002) 241 F.Supp.2d 246.....	7
Hydro Investors, Inc. v. Trafalgar Power, Inc., 227 F.3d 8 (2d Cir. 2000).....	19
In re Basic Food Grp., LLC, 2018 WL 5805943 (Bankr. S.D.N.Y. 2018)	8
Indus. Tech. Ventures LP v. Pleasant T. Rowland Revocable Trust, 688 F.Supp.2d 229 (W.D.N.Y. 2010)	12
JBCHoldings NY, LLC v Pakter, 931 F Supp 2d 514 (S.D.N.Y. 2013).....	14, 15, 17
JP Morgan Chase Bank v. Winnick, 350 F. Supp. 2d 393 (S.D.N.Y. 2004).....	18
Kirch v. Liberty Media Corp., 449 F.3d 388 (2d Cir. 2006).....	10
Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519. (2013).....	21

Knopf v Phillips, 802 F. Appx 639 (2d Cir. 2020).....	10
Kousnsky v. Amazon.Com, Inc., 631 F. App’x 22 (2d Cir. 2015)	21
Lanzi v Brooks, 54 A.D.2d 1057 (3d Dep’t 1976), affd, 43 N.Y.2d 778 (1977)	16
Latour v. Columbia University, 12 F. Supp. 3d	21
Lerner v. Fleet Bank, 459 F.3d 273 (2d Cir. 2006).....	17
Lexington 360 Assoc. v First Union Nat. Bank of N. Carolina, 234 AD2d 187 (1st Dept 1996).....	8
Mallis v. Bankers Trust Co., 615 F.2d 68 (2d Cir.1980).....	18
McCabe v. ConAgra Foods, Inc., 681 F. App’x 82 (2d Cir. 2017)	5
Medtech Products Inc. v. Ranir, LLC, 596 F Supp 2d 778 (S.D.N.Y. 2008).....	10
Miller v Holtzbrinck Publishers, LLC, 2009 WL 528620 (S.D.N.Y. 2009), affd sub nom., 377 Fed. Appx 72 (2d Cir. 2010)	19
Minn. Mining and Mfg. Co. v. Graham–Field, Inc., No. 96-cv-3839, 1997 WL 166497 (S.D.N.Y. Apr. 9, 1997)	12
NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc., 87 N.Y.2d 614 (1996)	10
NBT Bancorpt, Inc. v. Fleet/Norstar Fin. Group Inc., 215 A.D. 2d 990 (3d Dep’t 1995).....	12
Nelson v. Smith, 618 F. Supp. 1186 (S.D.N.Y. 1985).....	4
Northern Shipping Funds I, L.L.C. v. Icon Capital Corp., Eyeglasses, 2013 WL 1500333 (S.D.N.Y. 2013)	11

Orange Cnty. Choppers, Inc. v. Olaes Enterprises, Inc., 497 F. Supp. 2d 541 (S.D.N.Y. 2007).....	14
Owens v. N.Y.C. Dept. of Sanitation, 2013 WL 150245 (S.D.N.Y. 2013).....	23
PaySys Intl., Inc. v Atos Se, Worldline SA, Atos IT Services Ltd., 226 F.Supp.3d 206 (S.D.N.Y. 2016).....	20
Peter F. Gaito Architecture, LLC v Simone Dev. Corp., 602 F.3d 57 (2d Cir 2010).....	20
RFP LLC v. SCVNGR, Inc., (S.D.N.Y. 2011) 788 F.Supp.2d 191.....	11, 13, 15
Rich v Fox News Network, LLC, 939 F.3d 112 (2d Cir. 2019).....	10
Ross v. FSG PrivatAir, Inc., 2004 WL 1837366 (S.D.N.Y. 2004)(dismissing	5
Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124 (2d Cir.1994).....	17
Space Hunters v. United States, 500 Fed.Appx. 76 (2d Cir. 2012)	17
Spinelli v Natl. Football League, 903 F3d 185 (2d Cir 2018).....	20
Stadt v. Fox News Network LLC, 719 F.Supp.2d 312 (S.D.N.Y. 2010).....	7
Stern v Lavender, 319 F Supp 3d 650 (S.D.N.Y. 2018).....	22
Stuart Silver Assoc., Inc. v Baco Dev. Corp., 245 AD2d 96 (1st Dep’t 1997)	18
<i>Telecom Int’l Am., Ltd. v. AT&T Corp.</i> , 280 F.3d 175 (2d Cir. 2001).....	19
Theophilopoulos v. Cantilli, 1989 WL 115861 (S.D.N.Y. 1989).....	15

Thorsen v. Sons of Norway, 996 F.Supp.2d 143 (E.D.N.Y. 2014)	23
Todd v. Oppenheimer & Co., 78 F.R.D. 415 (S.D.N.Y. 1978)	15
Travelers Cas. & Sur. Co. v. Dormitory Auth.-State of N.Y., 734 F. Supp. 2d 368 (S.D.N.Y. 2010).....	19
Universal City Studios, Inc. v. Nintendo Co., Ltd., 797 F.2d 70 (2d Cir.1986).....	15
Valley Lane Indus. Co. v. Victoria's Secret Direct Brand Mgmt., L.L.C., 455 F. App'x 102 (2d Cir. 2012)	9, 11
Wall v. CSX Transp., Inc., 471 F.3d 410 (2d Cir. 2006).....	15
Wolff v. Rare Medium, Inc., 171 F.Supp.2d 354 (S.D.N.Y.2001).....	5, 10
Wolff v. Rare Medium, Inc., 210 F.Supp.2d 490 (S.D.N.Y. 2002).....	14
Yamashita v. Scholastic Inc., 936 F.3d 98 (2d Cir. 2019).....	20, 21
Zeising v. Kelly, 152 F Supp. 2d 335 (S.D.N.Y. 2001).....	18
Statutes	
17 U.S.C. §106(4)	21
17 U.S.C. §410(c)	22
28 U.S.C. §636(b)(1)	4
Rules	
N.Y. C.P.L.R. § 213(8)	17
Fed. R. Civ. P. Rule 72(b).....	4

Defendants Susan Sarandon (“Sarandon”), David Shara (“Shara”), Honey Shara (“H. Shara”), Tigran Tsitoghdzian (“Tsitoghdzian”) (collectively “Defendants”) respectfully submit the following objections to the Report and Recommendation dated December 18, 2023, by the Honorable Sarah Netburn, recommending that Defendants’ motion to dismiss Plaintiff Arthur Balder’s (“Plaintiff”) Third Amended Complaint (the “TAC”).¹ [Dckt. No. 86] (the “R&R”) be denied in part.

As set forth herein, the Defendants respectfully objects to some of Judge Netburn’s findings in the R&R, specifically the part of the R&R that recommended denying Defendants’ Motion to dismiss the TAC as to the claims for: (1) breach of contract against Shara; (2) tortious interference with contract against Tsitoghdzian; (3) tortious interference with business relations against Sarandon; (4) fraud against Tsitoghdzian and Shara; and (5) copyright infringement against Tsitoghdzian and Honey Shara². The Defendants respectfully submit that the Court should reject these portions of the R&R and grant the Defendants’ motion in its entirety.

STATEMENT OF FACTS

Plaintiff alleges³ that on or around April 4, 2017, he and Shara entered into the Producer Agreement (the “Producer Agreement”). TAC, Ex. 7. With respect to the painting and Plaintiff’s compensation, the Producer Agreement provided as follows:

That as a compensation of [Plaintiff’s] work in the [Film] started in April 2015, the [Plaintiff] will receive from [Shara] an original painting hand-made by artist Tigran Tsitoghdzian. [Shara] agree[d] that it will be a painting of the series ‘Mirrors’ portraying [Plaintiff’s] wife, Bella Jazmin de la Guia, no later than the last day of the month of May in the year 2017, and that **the painting will be 75x50 inch.**

¹ The Defendants’ moving papers submitted in support of their Motion to dismiss the TAC are referred to herein, and as such are expressly incorporated herein by reference.

² The Court has already dismissed the remaining eleven claims, and therefore only the claims which have not been dismissed in the R&R are addressed in this objection.

³ The facts provided in this section are relevant to Defendants’ objections to the R&R. The facts relevant to the claims which have already been dismissed have been removed.

Thus [Plaintiff] agree[d] that he thereto renounces to any additional upfront compensation calculated on the production budget of the film, but **[Plaintiff] will have 20% of profits, i.e., once final production budget recouped.**

TAC, Ex. 7, p.1 (emphasis added). For payment for expenses, the Producer Agreement provides:

The final production budget will be the result of the sum of all production expenses that have taken place until date and also adding those that may take place until the final termination of the [Film].

[Plaintiff] will provide and pay all additional Color Correction and Editing of the [Film] and other parts of the [Film] yet to be filmed without further production cost hereto and will provide any additional directorial and producer's work and scripts necessary to ensure the best result in such cases.

[Shara] agrees he will pay any additional costs to composer of original soundtrack, and [Plaintiff] will provide the composer any necessary files to ensure the optimal performance of his work.

If any additional production costs would be necessary beyond what has been already done to date, i.e., renting camera equipment, cameras, or lenses, for any additional shootings, etc., **[Shara] would have to provide additional funds upon approval of new estimations and new budget.**

Id. (emphasis added). As to distribution, the Producer Agreement provides that:

[Plaintiff] will inform and discuss any **distribution possibilities** with [Shara], both being informed in due time to ensure the best performance possible of the business.

[Plaintiff] cannot make any decision regarding distribution without contacting and getting written confirmation by [Shara]. Revenues have to be paid directly to [Shara], being distribution contracts always under his surveillance and executed according to his criteria.

Id, Pg. 2. (emphasis added). Lastly, the Producer Agreement provided that the parties “agree to the listed terms listed above signing all TWO pages of the agreement.” Id. The TAC’s relevant allegations of the parties’ interactions and breakdown of their relationship are referenced.

Lastly, the Producers’ Agreement provided that the parties “agree to the listed terms listed above signing all TWO pages of the agreement.” Id. The TAC’s relevant allegations of the parties’ interactions and breakdown of their relationship are referenced.

Plaintiff allegedly accepted the painting as upfront compensation “because Tsitoghdzryan made constant representations of **value** of Tsitoghdzryan’s artworks, mainly based on the auctions results at Phillips Auctioneers LLC, NYC, in 2014 and 2015, **which had been closed at much higher than the appraisal estimations.**” Id. ¶11 (emphasis added).

In October 2018, Shara allegedly proposed two new projects to Plaintiff, including one about the artists and art that made propaganda for the Nazis. TAC ¶128. On February 25, 2019, Plaintiff emailed Sarandon and “described the issues he felt the project was encountering,” including writing “[w]hat have we done, then, to deserve this estrangement from a great star...” and “...successful filmmaking, is a collaborative work, and I am missing a ‘fair’ collaboration, and at this point, in my opinion and anybody’s opinion who is familiar with matter, media o no media, this seems to be very well-deserved on my/our side.” TAC ¶159.

Sarandon wrote back stating, inter alia, “Arthus, I find your email to be very rude. I’ve never received an email like that before from anyone, especially someone whose film I briefly appeared in without compensation...I have nothing positive to say about your film and am no longer interested in being associated with it...” TAC ¶160.

Plaintiff responded with, inter alia, “[t]his time you’ve gone too far...”, “[y]ou may have an Oscar, but regretfully you lack many other basic things...” and “...overacting is the worst performance an actor can offer...”. TAC ¶164. Shortly after, Shara reached out to Plaintiff, saying, inter alia, “I read the emails, that is not ok...[y]ou need to write the nicest, most sincere apology in the world”. TAC ¶168. Plaintiff alleges that Shara wrote to him “under fear of potential litigation...” TAC ¶171. After Plaintiff refused to apologize, Shara wrote “[u]nfortunately we are not able to continue our relationship...[t]he other projects can never be exposed to the angry hateful words you spew at people...we are finished. [n]o more money, no more projects.” TAC

¶178.

Tsitoghdzian allegedly requested a copy of the film to show his parents. TAC ¶¶193, 344. H. Shara also allegedly requested a copy of the film for a friend in Canada. TAC ¶193. Plaintiff concedes that he did send H. Shara a copy of the Film under those terms. TAC ¶358. Plaintiff alleges that H. Shara then gave the film to Tsitoghdzian. TAC ¶193. Tsitoghdzian instead allegedly showed it to collectors and art dealers. TAC ¶344. Tsitoghdzian also allegedly displayed a text allegedly copyrighted by Plaintiff on his website until recently. TAC ¶352. Plaintiff alleges that Tsitoghdzian only had a license to show the text in a catalogue published in 2015. Id.

STANDARD OF REVIEW

In evaluating a Magistrate Judge’s Order with respect to a pretrial matter that is dispositive of a claim or defense of a party, a district court shall, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure and the Federal Magistrates Act, 28 U.S.C. 636(b)(1), review the recommendation de novo. Rule 72(b)(3) instructs the district judge to “determine de novo any part of the magistrate judge’s disposition that has been properly objected to.” see also *Nelson v. Smith*, 618 F. Supp. 1186, 1190 (S.D.N.Y. 1985). The district judge’s review may be based on the entire record. Fed. R. Civ. P. 72(b). Further, Rule 72 states that the “the district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.” Fed. R. Civ. P. 72(b)(3).

OBJECTIONS

I. PLAINTIFF FAILED TO SUFFICIENTLY ALLEGE BREACH OF THE PRODUCER AGREEMENT AGAINST SHARA

“The elements of a cause of action for **breach** of contract are the existence of an agreement, performance by the plaintiff, breach of contract by the defendant, and resulting damage.” *McCabe v. ConAgra Foods, Inc.*, 681 F. App’x 82, 84 (2d Cir. 2017). “[A] plaintiff must identify what

provisions of the contract were breached as a result of the acts at issue.” *Ellington Credit Fund, Ltd. v. Select Portfolio Servicing, Inc.*, 837 F. Supp. 2d 162, 189 (S.D.N.Y. 2011)(quoting *Wolff v. Rare Medium, Inc.*, 171 F.Supp.2d 354, 358 (S.D.N.Y.2001)(dismissing breach claim because plaintiffs failed to identify the contractual provisions that defendant breached)). “Stating in a conclusory manner that an agreement was breached does not sustain a claim of breach of contract.” *Id.* “[W]here there is no contractual obligation between two parties, there can be no breach of contract claim.” *Flatiron Acquisition Vehicle, LLC v. CSE Mortg. LLC*, 2019 WL 1244294, at *13 (S.D.N.Y. 2019)(citing *Fleissler v. Bayroff*, 266 A.D.2d 34, 34-46 (1st Dep’t 1998)).

The TAC is rife with allegations that Shara did not undertake actions that were not obligations in the Producer’s Agreement. Allegations of obligations not in the Producer Agreement are also properly disregarded because they are contradicted by the express terms in the Producer Agreement. *Flatiron Acquisition Vehicle, LLC*, 2019 WL 1244294, at *13 (citing *Ross v. FSG PrivatAir, Inc.*, 2004 WL 1837366, at *3-5, 8 (S.D.N.Y. 2004)(dismissing plaintiff’s breach claim after determining that the contract provisions allegedly breached were not set forth in the contract)).

A. Plaintiff Did Not Adequately Plead Breach of Contract as a Result of Alleged Late Payments of Invoices

The R&R held that Plaintiff sufficiently alleged that these Invoices were pre-approved production costs as defined under the Producers’ Agreement and Plaintiff’s allegation that Shara failed to pay them on time, is sufficient for a claim of breach. However, Plaintiff’s allegations regarding the late payment of the invoices relating to the documentary’s Oscar-qualifying U.S. theatrical release (“Invoices”) are not sufficient to state a claim for breach of contract where the Producer’s Agreement did not address these invoices and Plaintiff has failed to adequately allege approval.

Under the Producer’s Agreement, Plaintiff, not Shara, was responsible for most costs. TAC, Ex.

7. Producer Agreement, p.1 (Plaintiff will “pay all additional Color Correction and Editing of the film and other parts of the film yet to be filmed without further production cost hereto”). Shara was only responsible for “additional production costs” if there was a new approved budget – “[Shara] would have to provide additional funds upon approval of new estimations and new budget”. (emphasis added). TAC Ex. 7. The relevant provision of the Producer’s Agreement concerns approved additional “production costs”, which were very specifically defined as “i.e., renting camera equipment, cameras, or lenses, for any additional shootings, etc.”. Nowhere does this provision address distribution costs or costs related to a U.S. theatrical release, which is the subject of the Invoices. TAC, Ex. 7.⁴ Plaintiff even alleges that the Invoices were “distribution” costs pre-approved TAC 136, n. 98. The Producers’ Agreement has no clause making Shara responsible for any “distribution” costs. The R&R incorrectly conflates these Invoices with Shara’s obligation to pay the pre-approved “production costs”. Here, Plaintiff fails to allege which clause of the Producers’ Agreement has been breached by Shara’s allegedly late payment of the Invoices. The only clause in the Producers’ Agreement that is relevant to distribution specifically obligates Balder, not Shara, to “inform and discuss any distribution possibilities with [Shara].” Plaintiff has not pled that the Producers’ Agreement was breached because it obligates Shara to pay costs related to distribution and has failed to allege which obligation has been breached by Shara.

Though Plaintiff makes conclusory allegations that these were pre-approved costs, there are facts pled to create no plausible inference that Shara actually approved these Invoices, when these Invoices were approved, or whether these were categorized as “production costs”. TAC ¶ 3,

⁴ The R&R cites to TAC¶ 310, as a reference to Balder’s allegation that David Shara breached the Producers’ Agreement by not timely paying invoices. See R&R p.9. However, TAC ¶310 does not allege any such facts.

101, 202, n.56, Ex. 10. A conclusory allegation that the Invoices were part of a few email exchanges with Shara, relating to distribution of the Film, does not make it plausible to infer that Shara was under an obligation to pay the Invoices under the Producers' Agreement. *Stadt v. Fox News Network LLC*, 719 F.Supp.2d 312, 318 (S.D.N.Y. 2010) ("The [plaintiff] must allege the specific provisions of the contract upon which the breach of contract is based. A claim for breach of contract cannot be sustained simply by a conclusory statement that the accused breached a contract."). That is especially true where the allegation is that Shara approved these by "conduct". TAC f. 98.

Moreover, even if there was an obligation to pay these Invoices (which there was not), there was no time to pay specified in the Producer's Agreement. *Hidden Brook Air, Inc. v. Thabet Aviation Intern. Inc.* (S.D.N.Y. 2002) 241 F.Supp.2d 246, 269 (internal citations omitted) ("a contract specifies a definite time for delivery ... New York law requires the provisions specifying the date or dates for delivery to 'be strictly enforced in a contract action at law. In such an action, the parties are presumed to have agreed that time is of the essence.'") Here, the timing of any payment was clearly not in the Producer's Agreement.

The R&R held that it is reasonable for someone in Balder's position to understand Shara's obligation to pay these Invoices on time under the covenant of good faith and fair dealing. However, there was no time frame specified in the Producer's Agreement under which to pay these Invoices, nor is there a time is of the essence clause that would give rise to such an inference. In the absence of this, the R&R incorrectly creates an obligation that did not exist in the Producer's Agreement, which is not proper under well settled law. Had the parties wanted to negotiate a deadline for payment of the Invoices, they would have done so. "The covenant of good faith and fair dealing does not create obligations beyond those expressly set forth in the contract." In re

Basic Food Grp., LLC, 2018 WL 5805943, at *9 (Bankr. S.D.N.Y. 2018)(citing Granite Partners, L.P. v. Bear Stearns & Co. Inc., 17 F.Supp.2d 275, 306 (S.D.N.Y. 1998)(“the duty cannot be used to create independent obligations beyond those agreed upon and stated in the express language of the contract.”)).

Plaintiff’s breach of contract claim further fails as he also failed to allege any damages as a result of the “late payments”. (“In the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint....”) Lexington 360 Assoc. v First Union Nat. Bank of N. Carolina, 234 AD2d 187, 189-90 (1st Dept 1996) (internal citations omitted). Therefore, the breach of contract claim based on the late payment of Invoices fails.

B. The Plaintiff Does Not Adequately State a Claim for Breach for Receiving an Allegedly Unfinished Painting

Also, Plaintiff fails to allege breach of contract based on the allegation that an unfinished painting was delivered to him. Plaintiff has pled insufficient facts to explain how the painting was “unfinished”. Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc. (S.D.N.Y. 2009) 651 F.Supp.2d 155, 170 (“A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Plausibility “is not akin to a probability requirement;” rather plausibility requires “more than a sheer possibility that a defendant has acted unlawfully.” Pleading a fact that is “merely consistent with a defendant’s liability” does not satisfy the plausibility standard.”).

The terms of the Producer’s Agreement are clear regarding Shara’s obligation to deliver “an original painting hand-made by artist Tigran Tsitoghdzyan”. Plaintiff has failed to allege how there was any material breach of the agreement when he alleges that an original hand-made painting of his wife from the “Mirrors” series was delivered to him, which is precisely what the Producer’s Agreement obligated to be delivered. By failing to allege any facts to demonstrate how

the painting was “unfinished”, was it blank on part of the canvas? was it not painted properly? was it incomplete? did it have paint chipping off? **How was it incomplete? TAC ¶¶ 70, 150, 377.** Without facts the Court cannot plausibly infer that it was incomplete. Instead, he simply states that it was “unfinished” and that he informed Tsitoghdzian of its allegedly unfinished state in certain text messages. However, he fails to allege the **substance of these text messages** or state how this painting was “unfinished”. *Id.* Therefore, sufficient factual content has not been pled to draw the reasonable inference that the terms of the Producers’ Agreement to deliver an “original painting...from the Mirrors series” have been breached. *Id.*, Ex. 7.

Accordingly, the breach of contract claim against Shara fails on the basis of both factual allegations regarding the late payment of the Invoices as well as the allegedly “unfinished” painting.

II. PLAINTIFF HAS ALSO FAILED TO SUFFICIENTLY ALLEGE CLAIMS FOR TORTIOUS INTERFERENCE WITH CONTRACT AGAINST TSITOGHDZIAN

Under New York law, “[t]ortious interference with contract requires the (1) existence of a valid contract between the plaintiff and a third party, (2) defendant's knowledge of that contract, (3) defendant's intentional procurement of the third-party's breach of the contract without justification, (4) actual breach of the contract, and damages resulting therefrom.” *Valley Lane Indus. Co. v. Victoria's Secret Direct Brand Mgmt., L.L.C.*, 455 F. App'x 102, 104 (2d Cir. 2012); See also *Rich v Fox News Network, LLC*, 939 F.3d 112 (2d Cir. 2019); *Knopf v Phillips*, 802 F. Appx 639, 642 (2d Cir. 2020).

A. Plaintiff has Still Failed to Plausibly Allege Breach of an Identified Agreement

A plaintiff cannot prevail on an intentional interference claim unless it demonstrates an actual breach of the specified contract. *NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.*, 87 N.Y.2d 614, 620-21 (1996); *Kirch v. Liberty Media Corp.*, 449 F.3d 388, 402 (2d Cir.

2006)(affirming dismissal of a tortious interference with contract claim on the basis that “plaintiffs fail[ed] to allege ... actual breach” of a contract where the alleged acts did “not amount to an allegation that [the contracting party] violated the terms of a contract”).

As set forth in Section I(A) supra, Plaintiff has failed to allege conduct that resulted in an actual breach of the Producer Agreement. That is especially true where none of the outcomes would constitute a breach and Plaintiff has not identified particular provisions that were breached. Specifically, Plaintiff has not alleged how the Producer’s Agreement was tortiously interfered with, when Plaintiff himself states that he received an original painting from Tsitoghdzian.

B. Plaintiff Failed to Sufficiently Allege Knowledge or Intentional Procurement of an Alleged Breach

“[G]eneral claim[s] of [a defendant’s] knowledge of the contracts” [is] insufficient to show that defendant “was aware of the limitations [the contracts] imposed.” Medtech Products Inc., 596 F Supp 2d 778 at 813 (S.D.N.Y. 2008); Wolff, 171 F Supp 2d at 359. “[T]o avoid dismissal of a tortious interference with contract claim a plaintiff must support his [] claim with more than mere speculation.” Burrowes v. Combs, 25 A.D.3d 370, 373 (1st Dep’t 2006). Plaintiff still fails to allege facts to create a plausible inference that Tsitoghdzian had knowledge of the Producer Agreement or what terms were breached. TAC ¶¶259, 291, 341-342, 344.

Moreover, “[t]o satisfy the third element of the claim, intentional procurement of the breach, ‘it is not enough that a defendant engaged in conduct with a third-party that happened to constitute a breach of the third party’s contract with the plaintiff; instead a plaintiff must allege facts showing that the defendant’s objective was to procure such a breach.’” Corning Inc., 546 F.Supp.3d at 212-13 (internal citations omitted). Although the defendant need not have acted out of malice, “the interference must be intentional and an interference that is merely an intrusion that is negligent or incident to some other lawful purpose is not enough.” Northern Shipping Funds I,

L.L.C. v. Icon Capital Corp. Eyeglasses, 2013 WL 1500333, at *4 (S.D.N.Y. 2013).

Plaintiff has again failed to sufficiently plead facts that create a plausible inference that Tsitoghdzian's objective was to procure a breach of the Producer Agreement. The R&R does not discuss this element at all so it is presumed that Plaintiff has insufficiently alleged that Tsitoghdzian's objective was to procure a breach of the Producer Agreement.

III. PLAINTIFF HAS ALSO FAILED TO SUFFICIENTLY ALLEGE CLAIMS FOR TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS AGAINST SARANDON

To state a claim for tortious interference with business relations, a plaintiff must adequately allege that: "(1) the plaintiff had business relations with a third party; (2) the defendant interfered with those business relations; (3) the defendant acted for a wrongful purpose or used dishonest, unfair, or improper means; and (4) the defendant's acts injured the relationship." Valley Lane Indus. Co., 455 F. App'x at 105. "A claim of tortious interference with prospective economic advantage requires a showing of "interference with business relations existing between the [claimant] and a third party, either with the sole purpose of harming the [claimant] or by means that are dishonest, unfair or in any other way improper." If there are "no allegations in the complaint capable of supporting a reasonable inference that any ... defendant acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means," then the claim should be dismissed." RFP LLC v. SCVNGR, Inc. (S.D.N.Y. 2011) 788 F.Supp.2d 191, 196.

A. Plaintiff Failed to Allege the Existence of Business Relations with Shara with respect to the Nazi Propaganda Project

Plaintiff has alleged insufficient facts to establish the existence of a business relationship with respect to the Nazi Propaganda Project.

At the motion to dismiss stage, a plaintiff "must specify some particular, existing business relationship through which plaintiff would have done business but for the allegedly tortious

behavior.” Brown Media Corp. v K & L Gates, LLP, 586 BR 508, 530 (EDNY 2018); Indus. Tech. Ventures LP v. Pleasant T. Rowland Revocable Trust, 688 F.Supp.2d 229, 244 (W.D.N.Y. 2010) (citing Minn. Mining and Mfg. Co. v. Graham–Field, Inc., No. 96-cv-3839, 1997 WL 166497, at *7 (S.D.N.Y. Apr. 9, 1997) (emphasis added)).

The R&R cites to ¶134, 151 and 178 of the TAC as sufficient facts that have been pled to sufficiently allege the first element of this claim against Sarandon. However, Plaintiff has merely used **conclusory allegations** which is insufficient to assert plausible facts that a business relationship existed between Shara and Plaintiff regarding possible new projects such as the Nazi Propaganda Project. TAC ¶134, 151 and 178. Plaintiff references discussions between him and Shara to establish the existence of a business **relationship, which is insufficient.** Id.

B. Plaintiff Fails to Allege that Sarandon’s Alleged Behavior Was With the Sole Purpose of Harming the Plaintiff

The R&R held this claim should survive against Sarandon because Balder alleges that Sarandon’s “intention” was to “injur[e]” Balder relying on NBT Bancorpt, Inc. v. Fleet/Norstar Fin. Group Inc., 215 A.D. 2d 990 (3d Dep’t 1995)). However, **NBT** is not applicable for more than the element. As an initial matter, that case was decided at summary judgment, and more importantly **it does not follow the procedural standards applicable to federal courts.** Under applicable procedural law, “[t]o properly plead a wrongful purpose, [Plaintiff] would need to **plausibly allege that [...] Defendants’ actions were “for the sole purpose of inflicting intentional harm” on Plaintiff.** If Counter–Defendants’ “interference [was] intended, at least in part, **to advance [their] own competing interests,**” then there was no “wrongful purpose.” RFP LLC v. SCVNGR, Inc. 788 F.Supp.2d 191, 196 (S.D.N.Y. 2011) (holding there was no tortious interference where the counter-defendants were motivated at least in part by their own economic interest). This means that Plaintiff would have had to have pled facts that are sufficient to allow the Court to make a

plausible inference that the conclusory allegation that Sarandon's intention was to injure Balder was true. Here Balder failed to do so and as such, has not adequately pled this claim.

It is well settled that a lawful exercise of rights by Sarandon to protect herself, is an act committed to safeguard her own interests and is sufficient to rebut an allegation that the act was for the "sole purpose" of "inflicting intentional harm". SCVNGR, Inc. at 196. A conclusory statement that Sarandon intended to cause injury does not mean that the exception is applicable here, or that Sarandon's attempts to protect herself and exercise her legal rights are sufficient allegations to fulfill the requirement of "intent to cause harm". Plaintiff's allegations that Sarandon acted for the sole purpose of inflicting harm, are mere suspicions based on the alleged text messages sent by Shara stating a concern or mere possibility that Sarandon "will make a lawsuit against us". TAC ¶168. These allegations are mere suspicions based on the assumption that any such threat was actually made and are inadequate to support Plaintiff's claim that Sarandon allegedly made "litigation threats" with the sole purpose of causing harm to the Plaintiff. RFP LLC v. SCVNGR, Inc. 788 F.Supp.2d 191, 196–197 (S.D.N.Y. 2011) ("mere suspicions are inadequate to support a claim for tortious interference with business relations.") (internal citations omitted). Similarly, Sarandon forwarding Plaintiff's shockingly rude and unprofessional emails accusing Sarandon of having an affair with Tsitoghdzyan and impugning her and her body of work is also not unlawful conduct or an injurious act. Indeed, the parties receiving Plaintiff's emails, which are Plaintiff's own words, are entitled to make their own conclusions and decide whether or not to continue relationships with him.

C. Plaintiff Fails to Allege a Wrongful Means Without Justification or Unlawful Conduct

Moreover, a plaintiff must allege that the "defendant used 'wrongful means' to induce the third party to breach the contract." Orange Cnty. Choppers, Inc. v. Olaes Enterprises, Inc., 497 F.

Supp. 2d 541, 561–62 (S.D.N.Y. 2007)(citing Wolff, 210 F.Supp.2d at 499; Guard–Life Corp. v. S. Parker Hardware Mfg. Corp., 428 N.Y.S.2d 628, 631–32 (1980)). “‘Wrongful means’ includes physical violence, fraud, or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure.” Id. Where a suit is based on interference with a nonbinding relationship, the plaintiff must show that defendant's conduct was not “lawful” but “more culpable.” JBCHoldings NY, LLC v Pakter, 931 F Supp 2d 514, 535 (S.D.N.Y. 2013). The implication is that, as a general rule, the defendant's conduct must amount to a crime or an independent tort. Id. Conduct that is not criminal or tortious will generally be “lawful” and thus insufficiently “culpable” to create liability for interference with prospective contracts or other nonbinding economic relations. Id.

Plaintiff's allegation's that Sarandon allegedly “unduly harassed with threats of litigation,” and requested that the festival circuit be cancelled and that other projects be cancelled (id. ¶296) and called his email “rude” (id. ¶160) are not wrongful means or unlawful conduct. To the contrary, it is a lawful exercise of Sarandon's legal rights to control her publicity rights and to not allow him to use her name, likeness and image. Sarandon had no obligation to work with Plaintiff or want to be associated with him and Plaintiff sent that email knowing that. Plaintiff has not pled conduct that would make threats of litigation a wrongful means. The threat of litigation, is only a wrongful means if (1) “the [claimant] has no belief in the merit of the litigation” or, (2) “having some belief in the merit of the suit, [the claimant] nevertheless institutes or threatens to institute litigation in bad faith, intending only to harass the third parties and not to bring his claim to definitive adjudication.” RFP LLC v. SCVNGR, Inc., 788 F. Supp. 2d 191, 197 (S.D.N.Y. 2011)(citing Universal City Studios, Inc. v. Nintendo Co., Ltd., 797 F.2d 70, 75 (2d Cir.1986)). Plaintiff has not pled any facts that would show that threats had no merit or were only for the purposes of

harassment. Indeed, such a claim would have merit by Plaintiff's own allegations, as he admits that Sarandon never signed a talent release. TAC, ¶236. As such, Plaintiff failed to allege the third element of the claim.

IV. PLAINTIFF FAILED TO SUFFICIENTLY ALLEGE HIS FRAUD CLAIM AGAINST SHARA AND TSITOGHDZYN

“[F]raud ... requires a showing that ‘(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiff thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of such reliance.’” JBCHoldings NY, LLC, 931 F Supp 2d at 532; Wall v. CSX Transp., Inc., 471 F.3d 410, 415–16 (2d Cir. 2006). Rule 9(b) requires that allegations of fraud particularize the approximate time and place of the allegedly false representation and describe with particularity the allegedly false representation and any allegedly fraudulent transaction, and how the particular ... transaction furthered the fraudulent scheme. Theophilopoulos v. Cantilli, 1989 WL 115861, at *2 (S.D.N.Y. 1989); Todd v. Oppenheimer & Co., 78 F.R.D. 415, 420 (S.D.N.Y. 1978).

Plaintiff has once again failed to plead fraud with particularity. Plaintiff has mostly failed to allege the time, place, and description of the allegedly false misrepresentation, and has failed to plead any factual matter giving rise to the plausible inference that any such representation was false, facts to support a plausible inference of intent to defraud, that Plaintiff justifiably relied on such representation or that he suffered damages.

A. SHARA AND TSITOGHDZYN'S ALLEGED STATEMENTS DO NOT SUPPORT A FRAUD CLAIM

Plaintiff's general allegations that Shara and Tsitoghdzyan made false representations about the value of the painting are not sufficiently particular. TAC ¶¶44, 57, 68. Even the allegations that arguably provide the alleged statement and time it was made do not suffice. Plaintiff alleges (i) receiving an email from Shara dated October 25, 2016 that he had sold

Tsitoghdzyan's paintings at some unspecified time in the past for up to \$200,000; (ii) receiving an email dated November 30, 2016 that "mirror paintings cost 150-250,000 dollars", without reference to size (iii) Tsitoghdzyan allegedly writing at some point that they were "200k paintings;" (iv) the "promises and representations by [Shara] that the value of the painting would be much higher in just a few years; and (v) the paintings "potentially much higher value that it would reach after 2016." TAC ¶¶44, 55, 67-68. Plaintiff does not make factual allegations that the statements regarding the past or current values were actually false, nor are these specific enough to determine if defendants were even talking about comparable paintings.

The allegations that Defendants speculated about what he thought might happen in the future, cannot support an action for fraud since it is not a statement of fact. *Lanzi v Brooks*, 54 A.D.2d 1057, 1058 (3d Dep't 1976), *affd*, 43 N.Y.2d 778 (1977)(alleged statement that they would be higher in a few years, is not a statement of existing fact that is capable of fraud)(citing *Banner v. Lyon & Healy, Inc.*, 249 AD 569, *affd*, 277 N.Y. 570 (1938)); *Goldman v. Strough Real Estate, Inc.*, 770 N.Y.S.2d 94, 95 (2d Dep't 2003)("representation pertaining to the future development of the adjoining parcel did not amount to the perpetration of fraud").

The R&R failed to address that the alleged statement about the amounts Shara had sold the paintings for in the past is not alleged to be incorrect nor was it a representation of current value. Plaintiff's other allegation that the reference to Phillips' auction records in 2014 or 2015 were a "fraud" orchestrated by Shara and Tsitoghdzyan in 2014 and 2015 (TAC ¶69) is also insufficiently specific and barred by the 6-year statute of limitations on fraud. N.Y. C.P.L.R. § 213(8). Plaintiff's claim is literally based on nothing but rank speculation and conclusions, which do not satisfy Rule 9(b) nor are they plausible.

B. Plaintiff Also Failed to Plead a Plausible Inference of Intent

While intent may be alleged generally, "we must not mistake the relaxation of Rule 9(b)'s

specificity requirement regarding condition of mind for a license to base claims of fraud on speculation and conclusory allegations.” JBCHoldings NY, LLC, 931 F Supp 2d at 532, citing Lerner v. Fleet Bank, 459 F.3d 273, 290 (2d Cir. 2006)(citation omitted)). Rather, plaintiffs must allege facts that give rise to “a strong inference of fraudulent intent.” Id., citing Space Hunters v. United States, 500 Fed.Appx. 76, 79 (2d Cir. 2012)(quoting Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir.1994)). Plaintiff has failed to plead with specificity that Defendants intended to defraud Plaintiff as he did not allege facts that Defendants had motive and opportunity to commit or allege facts showing strong circumstantial evidence of conscious misdoing. Further, the R&R cites to ¶335 to TAC in reliance that the Plaintiff shows a clear motive to pay Plaintiff as little as possible. However, in ¶335, Plaintiff makes no mention of Defendants’ motivation. TAC, ¶335. Instead, Plaintiff makes an allegation about the value of the painting, which is distinct from Defendant’s motivation. Id. As such, Plaintiff’s allegation does not allege facts that give rise to a “strong inference of fraudulent intent.”

C. Plaintiff also Fails to Sufficiently Plead Justifiable Reliance

As far back as early 2016 Plaintiff admits that part of his compensation would be the painting. TAC ¶10. Therefore, allegations of representations that some mirror paintings were worth \$200,000 or had high value that were made in the fall of 2016, is insufficient to raise a plausible inference that Plaintiff justifiably relied on the alleged statements when accepting the consideration. That is especially true when Plaintiff has failed to plead anything about what size paintings were being referenced or whether they were comparable to what Plaintiff would receive, and in some instances, it is clear the conversation was about different sized paintings.

Moreover, Plaintiff’s admission that the Phillips’ appraisals and auction results that he allegedly relied on were public i.e., they were “worldwide since 2014” (TAC ¶11) further contradicts the conclusory allegation that reliance was justifiable. Stuart Silver Assoc., Inc. v Baco

Dev. Corp., 245 AD2d 96, 98-99 (1st Dep’t 1997)(Where a party **has the means to discover** the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on defendant’s misrepresentations).⁵ The R&R incorrectly states that Defendants are implying that Plaintiff **should have relied on certain information and ignored others**. Rather, the case law cited holds that **the information being publicly available, which Plaintiff concedes, renders Plaintiff’s justifiable reliance allegation moot**. The fact of the matter is that Plaintiff alleges **that the information he needed was publicly available**, and as such he has failed to plead this element.

D. Plaintiff’s Fraud Claim is Barred by the Statute of Frauds

The R&R also fails to address that Plaintiff’s fraud claim is barred by the Statute of Frauds. A plaintiff may not “circumvent the Statute of Frauds by **‘simply dressing up a breach of contract claim’** by alleging fraud. Zeising, 152 F Supp. 2d at 345 (citing cases). Where “the gravamen of Plaintiff’s fraud claim is that [the defendant] did not fulfill her side of the agreement... Plaintiff’s cause of action for fraudulent inducement sounds in breach of contract and constitutes and improper effort to circumvent the Statute of Frauds.” *Miller v Holtzbrinck Publishers, LLC*, 2009 WL 528620, at *4 (S.D.N.Y. 2009), *affd sub nom.*, 377 Fed. Appx 72 (2d Cir. 2010). Plaintiff’s repeated attempts to transform his claim for breach i.e., that he did not receive what he thinks he bargained for, sounds in breach of contract as the Producer Agreement expressly provided the consideration Plaintiff would receive and did not ascribe value.

⁵ *Amusement Indus., Inc. v. Stern*, 786 F. Supp. 2d 758, 775 (S.D.N.Y. 2011)(motions to dismiss because of a failure to adequately plead reasonable reliance have concerned situations where a plaintiff failed to examine readily available information); *JP Morgan Chase Bank v. Winnick*, 350 F. Supp. 2d 393, 406 (S.D.N.Y. 2004)(where plaintiff “has the means of knowing, by the exercise of ordinary intelligence, the truth, **or the real quality of the subject** of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.”)(citing *Mallis v. Bankers Trust Co.*, 615 F.2d 68, 80–81 (2d Cir.1980)).

V. PLAINTIFF'S FRAUD CLAIM IS DUPLICATIVE TO THE BREACH OF CONTRACT CLAIM

Nor does the R&R address that the fraud claim, and breach of contract claim are duplicative. The economic loss rule “prevent[s] the recovery of damages that are inappropriate because they actually lie in the nature of breach of contract as opposed to tort.” *Travelers Cas. & Sur. Co. v. Dormitory Auth.-State of N.Y.*, 734 F. Supp. 2d 368, 378-85 (S.D.N.Y. 2010); *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 227 F.3d 8, 16 (2d Cir. 2000); *Bristol-Myers Squibb, Indus. Div. v. Delta Star, Inc.*, 620 N.Y.S.2d 196, 181 (4th Dep’t 1994) (“The economic loss rule reflects the principle that damages arising from the failure of the bargained-for consideration to meet the expectations of the parties are recoverable in contract, not tort”). **Allegations of fraud in connection with a contract are not actionable “where a fraud claim arises out of the same facts as plaintiff’s breach of contract claim,** with the addition only of an allegation that defendant never intended to perform the precise promises spelled out in the contract between the parties.” *Frontier-Kemper Constructors, Inc. v. Am. Rock Salt Co., LLC*, 224 F. Supp. 2d 520, 527 (W.D.N.Y. 2002)(quoting *Telecom Int’l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 196 (2d Cir. 2001)). In such instances, “the fraud claim is redundant, and plaintiff’s sole remedy is for breach.” *Id.*

VI. THE COPYRIGHT INFRINGEMENT CLAIMS ARE NOT SUFFICIENTLY PLED

To state a claim for copyright infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *PaySys Intl., Inc. v Atos Se, Worldline SA, Atos IT Services Ltd.*, 226 F.Supp.3d 206, 215-16 (S.D.N.Y. 2016). In order to establish a claim of copyright infringement, a plaintiff with a valid copyright must demonstrate that: (1) the defendant has actually copied the plaintiff’s work; and (2) the copying is illegal because a substantial similarity exists between the defendant’s work and the protectible elements of plaintiff’s work. *Peter F. Gaito Architecture, LLC v Simone Dev.*

Corp., 602 F.3d 57 (2d Cir. 2010). To survive dismissal, a complaint alleging copyright infringement must allege: (1) which specific original works are the subject of the copyright claim; (2) that plaintiff owns the copyrights in those works; (3) that the copyrights have been registered in accordance with the statute; and (4) **by what acts and during what time** the defendant infringed the copyright. *Energy Intelligence Group, Inc. v Jefferies, LLC*, 101 F.Supp.3d 332 (S.D.N.Y. 2015).

A. Plaintiff Failed to Allege that Tsitoghdzian or Honey Shara Exceeded the Scope of the Licenses he Allegedly Gave

Where the **existence of a license is not in question**, “a copyright holder must plausibly allege that the defendant exceeded particular terms of the license” to state a viable claim. *Yamashita v. Scholastic Inc.*, 936 F.3d 98, 105 (2d Cir. 2019). With respect to the second prong of copyright infringement, ordinarily “[a] copyright owner who grants a nonexclusive license to use his copyright material waives his right to sue the licensee for copyright infringement.” *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998) (citations omitted); *Chapman v. N.Y. State Div. for Youth*, 546 F.3d 230, 235–36 (2d Cir. 2008)(quoting *Graham*, 144 F.3d at 236); *Davis v. Blige*, 505 F.3d 90, 100 (2d Cir. 2007)(same); Disputes involving the scope of a license present courts with a question of contract. *Spinelli v Natl. Football League*, 903 F.3d 185, 197 (2d Cir. 2018). Moreover, “only those performances that occur “publicly” are included in the performance rights granted under the Copyright Act.” See 17 U.S.C. § 106(4) quoted in 2 *Nimmer on Copyright* § 8.14 (2023).

Here, despite **conceding that Plaintiff granted a license** (TAC ¶193, 358) to Honey Shara to share a copy with a “friend in Canada”, Plaintiff alleges that Honey Shara exceeded the scope of her license. Indeed, Plaintiff alleges that **he provided her with a copy** for the purpose of her sending a copy of the Film to her “friend”—which Plaintiff seemingly alleges that she did. TAC,

¶358. That H. Shara allegedly sent the Film to her friend Tsitoghdzyan does not exceed the scope of the alleged license. Plaintiff **does not allege any restrictions** on which of H. Shara's "friends" could see it, nor does he ask which friend it is for. Therefore, H. Shara was well within the scope of the license by providing it to Tsitoghdzyan. As such these claims must be dismissed. *Latour*, 12 F. Supp. 3d at 663 (dismissing copyright infringement claim on the pleadings where plaintiff had provided a non-exclusive license to the work purportedly infringed); *Kousnsky*, 631 F. App'x at 24 (plaintiff could not bring a copyright infringement claim against defendant as a matter of law for selling works pursuant to a license); see also *Yamashita*, 936 F.3d at 105 (dismissing complaint where license was not in question and defendant failed to allege any breach of any specific license term).

Moreover, copyright infringement claim **against Tsitoghdzyan** fails because Plaintiff has failed to show **how showing the Film to collectors and art dealers constitutes copyright infringement under the Copyright Act**. This alleged act does not constitute a **"public performance"** under the Copyright Act. "A work is performed "publicly" if it is performed "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered... that **a performance limited to members of the family and invited guests is not a public performance.**" See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519. (2013) quoted in *Nimmer*. Tsitoghdzyan was allegedly provided with a copy of the Film by Honey Shara and allegedly showed it to a few art dealers, not publicly at a place "open to the public". Therefore, the claim of copyright infringement against Tsitoghdzyan based on the allegation that he showed the Film to "art dealers" fails.

Further, with respect to the **"text"** Plaintiff claims Tsitoghdzyan allegedly infringed upon, Plaintiff failed to adequately allege **that he is the owner of the copyright**. "Courts in this district

have held that “[t]o withstand a motion to dismiss, a complaint based on copyright infringement must allege: ... (2) that the plaintiff owns the copyrights in those works... BWP Media USA Inc. v Hollywood Fan Sites, LLC, 69 F Supp 3d 342, 353 (S.D.N.Y. 2014) (internal citations omitted). “To establish a copyright infringement claim, a plaintiff must show “both ownership of a copyright and unauthorized copying by the defendant.”” Stern v Lavender, 319 F Supp 3d 650, 667 (S.D.N.Y. 2018) (citing Hamil Am. Inc. v. GFI, 193 F.3d 92, 98 (2d Cir. 1999). “Under 17 U.S.C. §410(c), a “certificate of [copyright] registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright.” Stern v Lavender, 319 F Supp 3d 650, 670 (S.D.N.Y. 2018).

Here, while the copyright certificate lists the date of publication as January 1, 2015, the date of the registration is listed as May 18, 2022, over seven (7) years after the date of publication. The affirmation of Barry M. Golden (the “Golden Aff.”), Ex. 1. As such, the copyright certificate itself is not sufficient to allege ownership or originality required to own a copyright. Indeed, the copyright itself indicates that it includes quotes from other authors. Id. Plaintiff has not alleged that he created what was allegedly used in a manner sufficient to allege ownership of a valid copyright, which is a required element of his copyright infringement claim. TAC ¶352. As such, a Plaintiff’s copyright infringement claim must be dismissed.

For the Aforementioned reasons, Plaintiff’s copyright infringement claims against Tsitoghdyzan and H. Shara should be dismissed.

VII. PLAINTIFF’S TAC SHOULD BE DISMISSED WITH PREJUDICE

Dismissal here should be with prejudice, even where plaintiff is a pro se litigant. “If a liberal reading of [a pro se] complaint gives any indication that a valid claim might be stated, a court should grant leave to amend at least once before dismissing it with prejudice.” Owens v. N.Y.C. Dept. of Sanitation, 2013 WL 150245, at *3 (S.D.N.Y. 2013)(dismissing claims

that had no legal basis with prejudice, and providing plaintiff, “for the first and last time”, the opportunity to replead a few claims dismissed for pleading deficiencies)(citation omitted); Thorsen v. Sons of Norway, 996 F.Supp.2d 143, 167 (E.D.N.Y. 2014)(finding “that [an] additional opportunity to re-amend would be futile and that dismissal with prejudice is warranted”). **As Plaintiff is already up to his third-amended complaint**, one of which was in response to the Court’s prior order dismissing the amended complaint [Dkt. No.18] and the other in response to Defendant’s prior motion to dismiss the SAC, in which **the Court informed Plaintiff that a fourth amendment would not be granted absent extraordinary circumstances** [Dkt. No. 61], Plaintiff should not be given further leave to amend. Plaintiff has already used his opportunities to amend, has been unable to plead a claim, and any attempt to do so again would be futile and wasteful.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Defendants’ Motion to dismiss the TAC, Defendants respectfully request that the Court reject the Report and Recommendation as to the claims discussed, supra and grant Defendants’ Motion to dismiss the TAC in its entirety, together with such other and further relief as this Court may deem just and proper.

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